

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
KELLY BROWN, : 16-CV-07333 (RA)
:
Plaintiff, :
v. :
:
BARNES AND NOBLE, INC., : 500 Pearl Street
: New York, New York
:
Defendants. : January 31, 2018
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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: Calling case 16-CV-7333, Brown v. Barnes
2 and Noble.

3 THE COURT: Will counsel please make their
4 appearances for the record.

5 MR. PALITZ: Good morning, Your Honor. Michael
6 Palitz from Shavitz Law Group for the plaintiffs.

7 MR. HEPWORTH: Good morning, Your Honor. Marc
8 Hepworth; Hepworth, Gershbaum & Roth also on behalf of the
9 plaintiffs.

10 THE COURT: How are you?

11 MR. HEPWORTH: Very good, thank you.

12 MR. AIKEN: Good morning, Your Honor. Daniel Aiken
13 of Drinker Biddle & Reath for the defendant Barnes and Noble.
14 I have with me [indiscernible] from Barnes and Noble.

15 THE COURT: Hi.

16 MR. HORWITZ: Good morning, Your Honor. William
17 Horwitz from Drinker Biddle & Reath also on behalf of Barnes
18 and Noble, Inc.

19 THE COURT: All right. Hello. So we are here for
20 oral argument on the pending motion by plaintiffs for
21 conditional certification of the FLSA putative collective.
22 Since it's plaintiff's motion, why don't you start and then
23 I'll hear from Barnes and Noble.

24 MR. PALITZ: Thank you, Your Honor. May it please
25 the Court. Your Honor's very familiar with these legal

1 standards at this stage so I won't go through that history but
2 I will say that in your first decision you identified certain
3 deficiencies that plaintiffs had with the motion for
4 conditional certification.

5 What we did through discovery which was streamline
6 conditional certification discovery, we focused on those
7 issues. First issue was whether or not Barnes and Noble had
8 policies to train the café managers on nonexempt tasks. We
9 presented evidence of that in a brief. 30(b)(6) witness
10 admitted that Barnes and Noble had training policies that
11 trained café managers on how to make coffee, how to clean, how
12 to display products, how to display products and how to
13 sanitize products and the coffee makers and machines. We
14 identified those documents as Exhibit 2 in my declaration. We
15 also showed evidence that they were trained on how to complete
16 the tasks on a weekly and daily checklist. That was Exhibit
17 32. That checklist as many nonexempt manual labor type duties
18 similar to cleaning, sanitizing, setting up products,
19 following the corporate planograms on how to display these
20 products. We also showed there was a café manager curriculum.
21 The prerequisite to take that café manager curriculum was to
22 take the café server curriculum which is all nonexempt tasks
23 for the café service who are the hourly employees. So that
24 was the first main issue, Your Honor, identified with the
25 training.

1 The second issue was whether or not Barnes and Noble
2 directed café managers to perform nonexempt work through their
3 policies and procedures. We identified many policies and
4 procedures that Barnes and Noble's witness authenticated and
5 said apply to café managers nationwide. In those policies and
6 procedures, for example Exhibit 37, Barnes and Noble required
7 café managers and other employees to make coffee, to serve --
8 told them how to serve customers, told them procedures for
9 making tea, steaming milk, setting up the products, how to
10 prepare soup, how to serve a slice of cheesecake. They gave
11 them a three step process for that. They also have a policy
12 called the daily activity checklist, which I mentioned. Lists
13 the tasks that café managers have to perform. Notably in that
14 document it says if one person is working, it is their
15 responsibility to complete all the tasks on the checklist.
16 Mr. Hepworth provided a declaration to Your Honor which
17 summarized the day force schedules that were provided to us
18 from Barnes and Noble. In those schedules, 20 percent of the
19 time café managers worked alone. So during those 20 percent
20 of the time at least they were doing activities on the daily
21 activity checklist.

22 The third policy that we identified was that café
23 managers have to count the product in the freezer storage
24 items and place items in the freezer for proper storage. That
25 was the café prep sheet. That was Exhibit 37. We identify

1 other policies and procedures in our brief, Pages 12 and 13,
2 including the café food prep which is Exhibit 36 which also
3 talks about placing items in the freezer and dating them for
4 proper storage.

5 And then we also identified the job description for
6 the purpose of showing that it contains nonexempt job duties
7 and manual labor type tasks which as Your Honor is familiar
8 with the Ferrer v. Modell's case talked about how -- granted
9 conditional certification. And one of the points in that case
10 was that the job description contained manual labor nonexempt
11 duties.

12 The third main issue, Your Honor, identified was if
13 Barnes and Noble directed café managers to perform nonexempt
14 tasks. The way we present -- we obtained evidence of that
15 too. We talk about the day force scheduling, a system that
16 Barnes and Noble uses to assign shifts to workers in the
17 store. And one of the things they do through day forces they
18 tell their store manager when a café manager is performing
19 café service, assign them that task in the day force
20 scheduling program. So for example, if they're doing cashier
21 duty, assign them cashier duty. If they're doing barista
22 duty, assign them a barista duty. And they can put that in
23 the schedule which was what Mr. Hepworth summarized. The day
24 force schedules show 81 percent of the time the café managers
25 were assigned to cashier duties. They showed only 1.8 percent

1 of the time were they assigned to do café management tasks.

2 In addition to that evidence, we've shown -- the
3 30(b)(6), Barnes and Noble's 30(b)(6) representative testified
4 that all café managers perform nonexempt tasks. That was at
5 Exhibit 1, Page 186 to 187.

6 And then in addition to the documents I mentioned,
7 the daily activity checklist, the café prep sheet, the café
8 food preparation exhibit, there is also café responsibilities,
9 a document at Exhibit 33. When the café manager is doing the
10 cashier role, they're supposed to take orders and payments,
11 serve food, drinks, clean the café, stock displays and
12 replenish supplies. So that's how we address the three main
13 issues of Your Honor's first decision.

14 In addition to that, we have other evidence. Barnes
15 and Noble admitted café managers all perform the same duties
16 including nonexempt tasks. We had testimony from 15 café
17 managers who worked in 28 locations in 13 states saying they
18 all perform similar duties and 75 percent or more of their
19 time was on nonexempt work.

20 In total in this case we have 20 café managers.
21 They work in 33 locations in 15 states we identified in the
22 brief. Barnes and Noble also testified that they classified
23 every café manager as exempt outside of California. They
24 reclassified every café manager in October of 2016. Barnes
25 and Noble testified it didn't matter what duty they performed,

1 they were all classified as exempt. And that admission was
2 Exhibit 3, the Smith deposition at 37 to 38.

3 We think that this evidence shows that Barnes and
4 Noble -- that we meet the Myers standard of a similarly
5 situated individuals have performed the similar job duties,
6 subject to the same pay provisions, and they were all
7 classified as exempt pursuant to a simple common policy.

8 THE COURT: All right. Thank you. I have a couple
9 of questions for you. How would certification of conditional
10 certification be the most efficient way to proceed in this
11 matter?

12 MR. PALITZ: I think it would be the most efficient
13 way because the courts look at the FLSA's remedial statute.
14 And one of the main purposes of it is to protect workers. Our
15 request is to send out notice to all these individuals. Once
16 these people join, the way these cases typically work you have
17 representative discovery. So you're not having discovery over
18 everyone. It's a group of sample and then both sides take
19 discovery and then later there's a next step where Your Honor
20 decides is this case really -- is everyone really similarly
21 situated? There's a heightened standard at that point. So
22 this is not a case where they were sending out notice where
23 there's going to be hundreds of depositions. It would
24 probably be a small sample. Usually my experience it's been
25 about ten, 15, 20, depending on the number of people who join.

1 So I think it would be the most efficient way. It would also
2 protect the rights of these workers who largely are unaware of
3 this case. These are individuals who are earning \$35 to
4 \$37,000 a year. They're not following the court's dockets.
5 They don't know that this is going on with the exception of
6 some. And most of them don't. So sending a notice allowing
7 them to join and protect their rights would be the most
8 efficient way for us to proceed.

9 THE COURT: And supposing that I grant the motion, I
10 take it that after this representative or supplemental
11 discovery that you just described it would be a position that
12 you could prove that the classification, the exempt
13 classification, was improper as to all of the 1,100 members of
14 the putative collective and that you could do so on summary
15 judgment or at trial. Is that correct?

16 MR. PALITZ: Correct, with the one caveat being that
17 in these types of cases the defendant bears the burden of
18 proof that the exemption applies as opposed to the plaintiff.
19 But I can say there are incidents that we've identified in our
20 brief, there's a Stillman v. Staples case which is an
21 assistant manager retain misclassification collective action.
22 That case went to trial as a collective action. There was a
23 decision for all individuals who joined the case. The same is
24 true for case called Morgan v. Family Dollar. That's a store
25 manager misclassification case, similar situation on a

1 collective basis. There was a collective trial and a finding.

2 THE COURT: And how do you reconcile cases like this
3 that have been decertified, particularly some recent cases in
4 the Eastern District of New York?

5 MR. PALITZ: Well I think at the second stage, which
6 we're not at at this stage, if the evidence shows that there
7 really are variances in the duties and they're material to the
8 classification of the position and people are saying material
9 differences, then I could see a situation where it could be
10 decertified. But if they're not material, like for example we
11 cite in Jacob v. Duane Reade, and that was a Rule 23 decision
12 and it was denying decertification case, and there was
13 [indiscernible] Rite Aid, same case for store managers though.
14 Jacob v. Duane Reade was assistant. In those cases, defendant
15 did like they did here. They said some people did some amount
16 of management work, some people did less, some people did not.
17 And in those cases the courts held okay, no one is going to be
18 identical and that's not the standard that plaintiffs have to
19 show. If they show that their duties are largely consistent
20 across the class, we could proceed to trial. And that's what
21 I think is going to happen here. That's what the evidence has
22 shown so far. While we're not at the second stage, we don't
23 know what the opt ins who join later are going to say, I think
24 this will be similar to the Stillman type cases, the Morgan
25 type cases, the Jacob v. Duane Reade and [indiscernible] type

1 cases.

2 THE COURT: And how would you deal with
3 individualized defenses in that case?

4 MR. PALITZ: Well here I don't think there are
5 individualized defenses. Barnes and Noble testified they
6 classified everybody as exempt. Nothing that any café manager
7 did impacted how they were classified. They raise executive
8 exemption and administrative exemption defenses. And they all
9 apply. That's what they're saying. Those executive and
10 administrative exemptions apply to everyone. They're not
11 saying we misclassified some of these individuals and so
12 plaintiffs are right on those people. No. They're saying
13 everyone's exempt and we were right and that's their defense
14 for everyone.

15 THE COURT: All right. Now, didn't some of the
16 named plaintiffs admit that they did perform exempt duties
17 consistent with the job description?

18 MR. PALITZ: Your Honor, yes, there are admissions
19 that -- and we're not denying that there are some managerial
20 work that's performed. Our issue is this is not their primary
21 duty and that's what you have to analyze here. Just because
22 someone does some management work doesn't make them exempt if
23 they're spending most of their time doing cashier duties and
24 working alone. So that's the main issue.

25 THE COURT: So your theory then is that there's

1 common policy or policies that demonstrate café managers'
2 primary duty is not management and that they are performing
3 inconsistently with the job description?

4 MR. PALITZ: Correct. Although the job description
5 does contain nonexempt duties and manual labor tasks. So
6 those tasks we're saying are really their primary duties.
7 They're listed on the job description. It's not like they're
8 totally abandoned from the job description.

9 THE COURT: Okay.

10 MR. PALITZ: And I think one other point I'd like to
11 make is defendant has treated everyone the same. They've had
12 the same policies for everyone. They classified everyone as
13 exempt. They've admitted they all perform the same duties.
14 And they're asking the Court to do what they didn't do
15 themselves. They could have looked into this on an
16 individualized basis. And they're telling Your Honor that you
17 have to do that, you have to look at this on an individualized
18 basis. They didn't do that themselves. So you have to take
19 that argument and look at it and say well, defendant, you did
20 not do this. Why should the Court be burdened with taking
21 this individualized approach when you yourself did not do
22 that?

23 THE COURT: All right. Thank you.

24 MR. PALITZ: Thank you.

25 THE COURT: I'll hear next from defendant.

1 MR. AIKEN: Thank you, Your Honor. Is here fine or
2 would you like me to --

3 THE COURT: Whatever you're comfortable with.

4 MR. AIKEN: Thank you. Your Honor, Your Honor's
5 question about would certification be efficient, I mean the
6 answer is no. There is no common proof from the plaintiff of
7 what that policy is that they claim violations the FLSA. You
8 have the named plaintiff, her testimony, and it goes down the
9 list. Sure she says I did a high percentage of work. The
10 case law is clear. That high percentage especially in the
11 retail setting doesn't really matter that much. What matters
12 is whether the primary duty is management. So we look to the
13 regulations. What do the regulations say about how do you
14 determine the primary duties? And so we look at things like
15 delegating and directing work. I'm just focusing on the named
16 plaintiff now, Your Honor, and our brief lays out
17 [indiscernible] among the plaintiffs. The named plaintiff
18 says I delegated, it was completely my control to delegate
19 everything. There wasn't a single thing I couldn't delegate.
20 Then we go to okay, are you training employees? Absolutely.
21 I trained everybody. Plaintiff Brown trained every café
22 worker, she trained the manager, she trained the store manager
23 in how to work in the café. That was her job.

24 Hiring, she does not have ultimate authority to
25 hire. We've never claimed that. She has significant input

1 into hiring. The examples we provided, she interviewed 50
2 some -- she made 50 some hires in her tenure and can't think -
3 - couldn't identify one instance where her recommendation
4 wasn't followed. And if it was, maybe there are a handful.
5 The most important hire she made, the café [indiscernible],
6 her district manager which one witness described as an
7 overwhelming [indiscernible], this particular district
8 manager. The district manager and the store manager both
9 disagreed with Plaintiff Brown on the café [indiscernible].
10 She's not ready, we're not ready. Plaintiff Brown won the day
11 on that. Her recommendation on the hiring is what won. So
12 that goes for the hiring. Her input is without a doubt, and
13 there's no contrary evidence given significantly. And we are
14 not -- Your Honor, I want to be very clear because this has
15 been put out in the papers, we are not arguing merits here.
16 We're arguing that when you try to make a case based on
17 percentage of time what you really need to do is say well what
18 were they doing in that time? Were they doing two things at
19 once? Because that is the nature of retail and the
20 regulations recognize that. And so we're saying Your Honor
21 there are extremes. Plaintiff Brown, if we are talking about
22 summary judgment, Plaintiff Brown is I think so far our best
23 case for summary judgment in our favor. There are others
24 frankly that are weaker cases based on the their own
25 admissions. We identify opt in Devito and opt in Susa [Ph.].

1 I mean they claim not to have done anything. I think in our
2 favor, Your Honor, if you were to look at the merits, we held
3 them accountable for that. And the case law supports that if
4 you hold your employees who aren't doing the job accountable
5 to the managerial standards, then you don't lose the
6 exemption. But I think that's for another day. But there are
7 extremes here.

8 And then you move on to discipline, termination.
9 Brown admitted yes, I was constantly coaching. I gave out
10 lots of verbal warnings. The one termination that Brown was
11 involved in, she and her store manager worked together and
12 they worked with this district manager and they all agreed on
13 termination. So her view was given weight in that situation
14 as well. I will note plaintiffs haven't really offered any
15 evidence of terminations really being a significant part of
16 the job. I can't think of, and this isn't part of the record
17 -- I'll say there's been no evidence that terminations
18 happened with any frequency whatsoever to make it a
19 significant part of the analysis.

20 THE COURT: I want to ask you a question about
21 efficiency and also the common policies that plaintiffs have
22 raised. As I understand plaintiff's argument, they pointed to
23 things like the daily activities checklist for the CMs and the
24 day force schedule as applying commonly across the job and
25 that those policies essentially deprive the CMs of their

1 managerial discretion such that they're really not exercising
2 the kind of decision making that somebody would exercise under
3 the executive exemption. And how do you reconcile those
4 policies which as I understand do apply across the board with
5 your argument that this is insufficient for certification at
6 this stage?

7 MR. AIKEN: Thank you, Your Honor. So they actually
8 haven't identified a policy that dictates that a café manager
9 perform any of those tasks. These are company guidelines that
10 they are tools, this is what the testimony is, they are tools
11 and guidelines to help the café manager, to guide them. Now,
12 they identified the café responsibilities document. And we
13 put -- most of this argument is at 8 to 11 of our brief, Your
14 Honor, and the café responsibility document. And the
15 testimony was these don't dictate the duties and café
16 managers, there are guidelines and recommendations, and café
17 managers are free to change the guidelines based on the
18 complexity of the café. So no one -- and what's telling, Your
19 Honor -- I'll stop there. And I want to address Mr.
20 Hepworth's declaration which I think is just fundamentally
21 flawed and I'd like to address that. Just to stop there,
22 there's not been a single plaintiff who says I wasn't allowed
23 to direct the work and tell café workers where to go. So you
24 have these policies and not one plaintiff has said that policy
25 took away my discretion. And we submitted a significant

1 amount of evidence that the café managers had managerial
2 discretion in all areas of managing the café. And we're
3 talking about directing employees, delegating tasks. That
4 relates to the weekly task list, Your Honor, so I'll come back
5 to that. That relates to running their own contest to boost
6 sales, how to manage their profit margin. Not a single
7 plaintiff could identify a policy that dictated, that didn't
8 give them discretion in any of these areas.

9 So then you turn to the notion that the other policy
10 that said that the café managers had to count inventory. And
11 this is in our brief really clearly, that Mr. Moribido
12 testified no, actually that's not management work. They don't
13 need to do that. That guideline showed how it needs to be
14 done. And Your Honor, we have 600 plus stores and like many
15 retail locations, we're trying to have some national standard.
16 That doesn't create grounds for class certification. We have
17 standards and we have guides to help these people that are
18 hired in. In fact, you don't have any plaintiffs that say
19 they even used those guides because they are just guides. A
20 lot of what they learned happens in training, their own
21 experience, all of that stuff. But none of what the
22 plaintiff's experience that was testified to even relates,
23 there's no nexus between what the plaintiff's experiences were
24 and these policies.

25 And so just to keep going on that, the ISOs that

1 they identified, store managers, district managers, they all
2 see these ISOs. These are just kind of basic operating
3 principles. Again, the testimony was not they have to follow
4 these, these are mandated. Mr. Moribido's testimony was these
5 are guidelines and really you have to see what happens at the
6 store. It's all kind of a store level thing. None of these
7 policies say there's only one way to run your café.

8 THE COURT: So why -- what is your strongest case
9 that you want me to rely on for finding that plaintiffs didn't
10 meet the relatively low standard for condition certification
11 here?

12 MR. AIKEN: We don't believe it is low at this
13 point, Your Honor, given the extent and the amount of
14 discovery that's happened. But our strongest case, and I
15 think Your Honor's initial opinion really sets out the
16 standard well, but I think our strongest case as I read, this
17 was cited in plaintiff's brief and there are others, but
18 Warman v. American National Standards Institute. In that
19 case, conditional certification was denied because the
20 plaintiff couldn't come up with common proof to demonstrate
21 that he and the others that he wanted to represent were going
22 to meet the standards to demonstrate that they're employees
23 versus trainees across the board. And the way the court
24 looked at it was okay, this is the way we have our brief,
25 okay, let's look at what it takes to prove that you're an

1 employee versus a trainee, and they look at the economic
2 realty test and all that. And then the court said well, you
3 don't have a common way of proving that. You have vast
4 differences in the evidence that you're going to present
5 between yourself, plaintiff, and the other people that you
6 look to represent. And that's what we have here, Your Honor.

7 THE COURT: So how is this the standard that you're
8 urging me to apply, how does that differ from the standard
9 applied on a decertification?

10 MR. AIKEN: It's a good question, Your Honor, and I
11 think it's a question of when you look at the evidence, what
12 is the sort of -- what's the reality of the case now? Now I
13 think this standard requires you to look more into where are
14 the differences? And if this case is certified, is it very
15 likely to be decertified? And I think in this case it is very
16 likely to be decertified. You already have, as we said, vast
17 differences in their experiences. Plaintiff Brown, the named
18 plaintiff, can't point to her testimony and say this testimony
19 is going to prove lack of an exemption for everyone because
20 she's the best of the extreme and she agrees that she
21 delegated, she agrees that she hired and fired, supervised,
22 truly acted as a supervisor and took ownership of it. So that
23 standard asks the Court to look okay, we had this low bar, and
24 that's really what plaintiff's banking on here. We set the
25 low bar and we think we can just get over it. They don't

1 offer the testimony of their own people. They try to point to
2 policies and say hey, there's a policy that applied to
3 everyone, just let us have conditional certification. They
4 don't take on the extensive record evidence that says this
5 case can never be proven with common proof.

6 THE COURT: If you're moving for summary judgment,
7 do you believe that there would be common proof that this
8 position is properly classified as exempt?

9 MR. AIKEN: Not with respect to the plaintiff, not
10 as it exists now. We have, we believe, strong summary
11 judgment cases with respect to definitely Brown, definitely
12 Haglin [Ph.], definitely Hurley, definitely Caroto [Ph.] and
13 definitely Roman. Those would be plaintiffs that come to mind
14 right now, Your Honor, as people that have just admitted that
15 they were truly the managers and that was their primary duty.
16 They admitted it outright.

17 And I will say there's no evidence of a plaintiff
18 testifying that this job description wasn't more or less
19 accurate. No one denied that they were the primary
20 responsible, and there's no evidence in the record, they were
21 the primary person responsible for the café.

22 THE COURT: So is my understanding correct that your
23 view is that you have to move for summary judgment as to each
24 individual manager to determine whether they are satisfying
25 the job description which you contend describes an exempt job?

1 MR. AIKEN: Yeah. At this point there are managers
2 I think that [indiscernible] it would be appropriate to grant
3 summary judgment. There are managers where I think that would
4 be a much closer call and we would not rely on common proof.
5 We would rely on the evidence relating to their experience.
6 And --

7 MR. PALITZ: [Inaudible]?

8 THE COURT: No, that's --

9 MR. AIKEN: And so what I was going to do, Your
10 Honor, is just refer to the Hepworth declaration. And there's
11 just a pretty obvious flaw and we point it out in our papers.
12 So if you go through the first page of the time sheets, it's
13 really difficult to read, but if you start with the second
14 one, it just becomes really clear, and this is consistent with
15 the declaration that we submitted, that CA was used for
16 everyone who worked in the café, period. So if you look at
17 02178, you have Tamra Murphy and Elizabeth Riley. She was in
18 the bookstore area. They're both scheduled at the same time
19 on October 12, 2015 and they both have the CA designation.

20 THE COURT: Hang on a minute. I want to go there.

21 MR. AIKEN: Yeah. Sure.

22 MR. PALITZ: What day and which exhibit?

23 MR. AIKEN: It's your declaration.

24 MR. PALITZ: No, you said whose name? Sorry. In
25 the --

1 MR. AIKEN: Tamira Murphy.

2 MR. PALITZ: Thank you.

3 THE COURT: So I'm going to exhibit again?

4 MR. AIKEN: I believe it's 28 to Mr. Hepworth's --
5 Mr. Palitz's declaration and it relates to Mr. Hepworth's
6 declaration and the --

7 THE COURT: Just getting there because I've had his
8 --

9 MR. AIKEN: Your Honor, I'm happy to provide my copy
10 although it has highlights.

11 THE COURT: Yes, why don't you do that? Because
12 this is -- oh wait, here we go. I think I have it now. Let
13 me make sure it's the same thing. Okay. I'll just look at
14 this. All right. So go ahead.

15 MR. AIKEN: So Your Honor, and the highlights were
16 for me, Your Honor, but if you go through each page, and I
17 started on Tamira Murphy on the first page --

18 THE COURT: Right.

19 MR. AIKEN: -- every person who's in the café has
20 that CA designation. It's not as if there's evidence that
21 they were using all of these other designations. It's the
22 only designation except for, Your Honor, café projects which
23 was sometimes used. I mean very rarely. And I don't believe
24 in that sample there is a CM for café manager because I don't
25 believe it was used. But if that's not correct, then it only

1 happened in one or two occasions. And so the declaration
2 offered by Mr. Hepworth has really -- is not useful to the
3 discussion to determining what the people did on their shift.
4 And that's consistent with every plaintiff's deposition. And
5 to be clear, no plaintiff claimed to be stuck at the cash
6 register and assigned to the cash register. It just didn't
7 happen and there's no proof of that.

8 Mr. Moribido, when shown these designations, said
9 no, you'd have to see what happened on the store level. All
10 that tells me is that they're in the café. Despite that,
11 despite the -- and if you go, Your Honor, and for the record
12 it's not in front of Your Honor anymore, if you go to like
13 Plaintiff Anthony Roman's daily coverage report, and this is
14 at, just for the record, to site the Bates numbers BNN6669.
15 It's 11/28/2015 which is a Saturday. He's on a shift
16 supervising six café workers and they all are -- they are all
17 assigned CA and no other designation. It's an absurd result
18 assumption to think, truly absurd, that they're all at the
19 cash register and no one's assigned to make drinks, no one's
20 managing, no one's doing anything except for on the cashier.
21 The declaration and the analysis doesn't reflect even what's
22 on the schedule or the reality of the evidence.

23 THE COURT: So you're saying what I'm looking at
24 with the schedule, the CA just means assignment to the café?

25 MR. AIKEN: Yes.

1 THE COURT: Okay.

2 MR. AIKEN: And that's consistent with the testimony
3 as well as the declaration.

4 THE COURT: Okay. All right.

5 MR. AIKEN: And Your Honor, just to tie it all
6 together, all of that is not to argue the merits. I want to
7 be clear about that. It's to show that the plaintiff's own
8 evidence, not our competing declarations which there are a
9 significant amount which are consistent with the named point
10 it's testimony as well as Heglin's [Ph.] and Roman, that they
11 managed, no matter what task they were performing they were
12 managing. And that is exactly what the regulations say is
13 appropriate. And all of that shows that there is no common
14 policy tying these plaintiffs together. It is a collage of
15 different experience with extremes, and that is the point of
16 really 18 to 35 in our brief which is to highlight those
17 differences and highlight the lack of a common policy. On the
18 key elements, this is not in the margins, Your Honor, key
19 elements of proof which is to go down the list to determine
20 what the primary duty was. Was the primary duty management?
21 And we go through all of those in our brief and show that
22 there are extremes in that. And that's all I have, Your
23 Honor.

24 THE COURT: Okay. Thank you. I want to ask --

25 MR. HEPWORTH: Your Honor, if I just say one thing?

1 THE COURT: Yes.

2 MR. HEPWORTH: Mr. Palitz will handle any potential
3 rebuttal only because I'm Mr. Hepworth so I want to obviously
4 address Mr. Hepworth.

5 THE COURT: Yes.

6 MR. HEPWORTH: At some point you can't just disavow
7 every document you submit to the Court. And I'm just going to
8 read where Ms. Fitzgerald affirms under oath that as a matter
9 of default day force automatically fills in the daily
10 assignment sheet using CA. However, their own day force
11 policy undermines this claim. It actually says, and it's
12 Exhibit 30, the first activity on the list is what day force
13 will default to. The first activity for CMs is CM, café
14 management and not CA as Mr. Aiken and Ms. Fitzgerald have
15 falsely claimed.

16 Moreover, if you notice in the one document that Mr.
17 Aiken just showed you he said it only says CA. I went through
18 every single one. There is listing of POS, point of sale; CA,
19 CAB, café barista; CAE, café e-planner; CAP, café project;
20 CSI, customer service; P, projects; I, inventory; CWI, cash
21 rep; MTG, meeting. It's all on Page 9 of the brief. So the
22 idea that it's only CA is mere silly, number one. But the
23 most important thing, if you just take everything off the
24 table, we're now being told that counselor, here are our
25 documents we're exchanging in deposition. Day force document

1 says all this. But guess what? When we put our motion before
2 the Court, we're now going to disavow all the documents that
3 we submitted to you. And that's in the reply and that's in
4 our papers. Just because he said Mr. Hepworth and I'm Mr.
5 Hepworth. So to the extent you have other questions, Mr.
6 Palitz is happy to handle any other rebuttal.

7 THE COURT: Okay. Are there any other points that
8 you wanted to make?

9 MR. PALITZ: Yes. Briefly, Your Honor, if I may. I
10 think the entirety of defendant's argument is these
11 individuals, café managers, performed exempt work, they were
12 correctly classified. Almost all of their brief talked about
13 the executive exemption elements and that was the argument
14 today. So while Mr. Aiken may say I'm not talking about
15 merits, he's talking about the primary duty, hiring and
16 firing, disciplining, interviewing. And those are not
17 relevant at this stage. Those are not -- we don't have to
18 show that plaintiffs all did not hire. But you know what,
19 Your Honor? We did because we anticipated this argument.
20 They cannot hire. The defendant admitted that. Mr. Aiken
21 said something else here that Ms. Brown can hire but that's
22 what their corporate representative admitted. Also admitted
23 they couldn't fire. But I think those are merits issues.

24 The other point I wanted to make in our brief there
25 was a case called Ibea v. Rite Aid, and in that case it was

1 similar to the arguments here, the court held that defendant
2 places an extreme burden on plaintiff and makes it almost
3 impossible to assert misclassification claims in a collective
4 action thereby defeating the stated purpose of the FLSA and
5 wasting judicial resources by requiring courts to consider
6 each individual plaintiff's claims in a separate lawsuit.
7 This goes to Your Honor's question of how is this sufficient?
8 That's how it's sufficient. Judge Pitman explained it quite
9 clearly. The FLSA is a remedial statute. You have all the
10 claims together. You proceed as opposed to having Your Honor
11 hear multiple claims and decide individual [indiscernible]
12 which I don't think is going to happen at the end of the day.
13 I think we have stacks of common policies the and procedures,
14 we have testimony from a group all testifying about the same
15 thing, defendant admitting that all the policies and
16 procedures are the same and that people perform the same job
17 duties. This is not a situation where we have café managers
18 and then we have mechanics involved and there's a lot of
19 differences. This is same group of core duties that are at
20 issue here.

21 Then I just wanted to address the guidelines
22 argument which you hear often in these retain
23 misclassification cases. Well, we have stacks of policies and
24 procedures but they are only guidelines and café managers can
25 do as they please. Well, that's contrary to their own

1 documents. Exhibit 27 talks about how café managers must
2 follow store operating company standards. They must adhere to
3 the operational guidelines when resolving the customer
4 complaints surfacing the issues to the store manager. They
5 must follow brewed coffee recipes in accordance with Starbucks
6 standards. They must comply at all times with the standards,
7 policies, and the code of business conduct and ethics set out
8 in the bookseller handbook. So this guidelines argument is a
9 self-serving post litigation argument that was developed to
10 detract the Court, created a red herring, and ignore the
11 reality is that you have to comply with the policies and
12 procedures. That's what Barnes and Noble tells its café
13 managers. I'm happy to answer any other questions Your Honor
14 has.

15 THE COURT: You're stating that I should disregard
16 certain declarations that defendant has put in including from
17 Fitzgerald and I'm wondering if I disregard those now,
18 wouldn't those individuals be testifying as to the same thing?

19 MR. PALITZ: Your Honor, maybe but here's the issue.
20 Those individuals may not join this case, so they may not be
21 part of this at all. Also what I found in these cases when
22 employers gather these declarations, there's this issue of are
23 they being coerced into doing this? And this was expressed in
24 the Amadore v. Morgan Stanley case we cited. And when you ask
25 individuals like this well what happened? What happened with

1 this declaration? Why did you sign it? You find out some
2 interesting things. And I'm not saying there was misconduct
3 here, but certainly in some other cases I've found that people
4 were told they have to sign their declarations or they might
5 lose their job. They were told that they have to work with
6 the employer's counsel and they weren't given a full picture
7 of what was going on. So we'll see what happens. If some of
8 these people join, we'll deal with that at a later day. But
9 right now they're not in the case, they may not join. And the
10 issue at the second stage is is the group of people who join
11 similarly situated so this case could proceed to trial. And
12 you'll analyze the three factors at that point. So these
13 people may not be in so it may not be an issue.

14 As to Fitzgerald, again, it's more of a merits
15 issue. You know, she is trying to say oh, the policy says
16 this but that's not how it happened. And Mr. Hepworth already
17 talked about how for café managers the tasks you're assigned
18 is café manager automatically and then you have to be switched
19 to café cashier. That's in their own policy. So that
20 argument, you know, if she wants to disclaim the policy, the
21 jury is going to have to decide who's telling the truth here,
22 the policy or Ms. Fitzgerald because that's just a factual
23 dispute and at this stage, Your Honor, the Court does not
24 resolve factual disputes. As Judge Abrams said, you know,
25 even if the Court found ambiguities in the paper seeking

1 collective status, all inferences must be in favor of the
2 plaintiff at this stage. So I think Your Honor has to look at
3 what Mr. Hepworth said, has to look at what the policies are
4 and resolve it in plaintiff's favor as to the day force issue
5 now.

6 THE COURT: Okay. Thank you. Anything further from
7 defendant?

8 MR. AIKEN: If I might be brief, Your Honor. It
9 sounds like every -- so this is with respect to Mr. Hepworth's
10 declaration -- every schedule they submitted is completely
11 consistent with what we went through which is that CA is used
12 exclusively. It's only in the schedule that they didn't
13 submit that uses other ones, use the other designated. What
14 I'll point out is the plaintiff's testimony is not consistent
15 with Mr. Hepworth's declaration. So the premise here is rely
16 on our attorney's review of these declaration. We've already
17 shown at least with respect to 31 of them doesn't really hold
18 water. And then rely on the declaration with respect to the
19 ones that weren't submitted. I'm not saying that there's any
20 misrepresentation of how he read it, but what I am saying is
21 whatever you want to do with that declaration it's just not
22 consistent with the plaintiff's own experience, and that's
23 much more valuable. And we're not asking to weigh credibility
24 between plaintiff and their own counsel. Right? We're just
25 saying that we presented the plaintiff's own experience and I

1 think in that way this case is not the same as the cases that
2 you see in those other -- that are cited. You don't have
3 plaintiff saying well, I only did this, I didn't really do all
4 that managerial stuff. That's all consistent. We have
5 plaintiffs who admit all that. So in that way this case is
6 not unique. It stands out, Your Honor, as a case that has a
7 lot of evidence that runs contrary to the central core, the
8 central theme. And there's no one policy they point to. It's
9 just hey, you have some strict guidelines that we think you
10 need to follow. No evidence that they actually do. But
11 together that kind of shakes out that they might not be --
12 they might have had their discretion taken away but we have
13 plenty of evidence that discretion wasn't taken away. And so
14 it's like there's a theory that they've attacked and tried to
15 limit this case to just these very neat admissions and the
16 questioning in the depositions is clear what the plan is if
17 Your Honor reads it. The questioning is this is a policy that
18 doesn't apply. And we say okay, they're guidelines. Sure
19 they apply to everyone but they're guidelines. They say we're
20 trying to disavow our documents, but we have the experience.
21 It's a national company. We have standards for sure. And
22 Your Honor recognized that in the first opinion which is yeah,
23 you're going to have standards for how to do these things.
24 The question is different than that. And we believe we
25 presented a significant amount of evidence that there's no

1 common proof to answer that central question.

2 THE COURT: One more question --

3 MR. HEPWORTH: Your Honor, can I say one thing?

4 THE COURT: Yes.

5 MR. HEPWORTH: I did not -- although in my
6 declaration -- I want this clear as day based upon the
7 representation of Mr. Aiken. I submitted samples of the
8 schedules. I looked at every single schedule. I'm more than
9 happy to submit to the Court every schedule. And if you
10 notice, I even referenced in Paragraph 3 of my declaration by
11 way of example one of them were Bates stamped 630 to 704, 804
12 to 989. They totaled up to I think 1,000 pages, 1,000 pages I
13 wasn't going to bother the Court with. Based upon the
14 representation of Mr. Aiken that we only submitted some of
15 them, that was not the case. We submitted for samples. And
16 it says in my declaration sample I looked through every single
17 one. In fact, it notes that they were scheduled for 6,814
18 hours. That wouldn't match the 28 that I submitted. I don't
19 want any misrepresentation.

20 THE COURT: I understand. I have one more question
21 for the plaintiffs which is if I were to grant conditional
22 certification, what additional common discovery do you believe
23 you would be seeking in order to move forward to trial?

24 MR. PALITZ: Your Honor, we would need some
25 discovery as to damages for individuals who join. We would

1 need discovery relating to affirmative defenses that defendant
2 has raised. And then we would likely need discovery as to New
3 York class we pled and the Illinois class which may be just
4 obtaining discovery from putative class members or people who
5 join the case and it may overlap. But I think that would be
6 probably -- there may be some email discovery, ESI from the
7 corporate level, and potentially from the store level for the
8 email boxes at the store. We've seen that district managers
9 communicate with stores with directing some things. So for
10 the representative group we'd probably seek that type of
11 evidence. So for example, if there were ten people deposed,
12 we would seek the emails for those ten stores.

13 THE COURT: So would you be seeking more information
14 on whether or not the individuals who joined are similarly
15 situated?

16 MR. PALITZ: Well, we have all the policies I think
17 now so we wouldn't be seeking those. We would just seek -- if
18 there's going to be discovery as to some people, we would seek
19 some email discovery and any documents relating to those
20 individuals.

21 THE COURT: Okay. Thank you. I don't have any
22 further questions and I want to thank both sides for your
23 excellent briefing and argument and I will reserve judgment.

24 MR. PALITZ: Thank you, Your Honor.

25 MR. AIKEN: Thank you, Your Honor.

* * * * *

I certify that the foregoing is a court transcript from
an electronic sound recording of the proceedings in the above-
entitled matter.

Mary Greco

Mary Greco

Dated: February 4, 2018